No. 87-1629

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of Washington

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

D. MICHAEL YOUNG *
JOHN T. PIPER
CHRISTOPHER N. WEISS
BOGLE & GATES
The Bank of California
Center, Suite 2000
900 Fourth Avenue
Seattle, Washington 98164
(206) 682-5151
Counsel for Appellants
National Can Corp., et al.

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1629

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of Washington

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

---

1. The State is wrong in its assertion that Article III principles, repeatedly recognized in criminal cases, have no application to civil cases. The State asserts, without authority, that different Article III standards apply in civil and criminal cases. (Motion at 23.) The underlying imperative of Article III and the separation of powers doctrine permit no such distinction. Nor has this Court suggested one would be appropriate. *See* J.S. at 8; Brief of Amici Curiae American Sign & Indicator Corp., *et al.*, at 8-10.

2. The State's argument that Tyler is not advisory because it "applies prospectively" "to appellants' refund

claims" is a contradiction in terms. (*See* Motion at 22.) A decision limited to pure prospective application is, by definition, mere dictum. *Stovall v. Denno*, 388 U.S. 293, 301 (1967). Such a decision does not determine the rights and obligations immediately at issue in the case. *James v. United States*, 366 U.S. 213, 225 (1961) (Harlan, J., concurring) (in light of the inherent restraints imposed by Article III, this Court's "decisions in the tax field" must be given retroactive effect as "the normal concomitant of the fact that [the Supreme Court does] not sit as an administrative agency making rulings for the future, but rather adjudicate[s] actual controversies as to the rights and liabilities under the laws of the United States.").

3. The cases cited by the State do not suggest that pure prospective application of this Court's Tyler decision is consistent with Article III. The declaratory judgment actions cited by the State (Motion at 21-23),[1] all satisfy Article III's case or controversy requirement. In each case, the parties' rights were determined by a judgment applying the rule of decision directly to the parties —the prevailing party obtained the relief it requested. By contrast, the taxpayers here, despite having prevailed in *Tyler*, have been denied on remand the recovery of discriminatory taxes that was the very controversy in *Tyler*.

In particular, *Lemon II* and *Norris*, chiefly relied upon by the State, do not support the proposition that this

---

[1] *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *Nashville, Chattanooga and St. Louis Railway v. Wallace*, 288 U.S. 249 (1933); *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978).

Lemon v. Kurtzman, 411 U.S. 192 (1978) ("Lemon II"), and *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983), also are properly viewed as declaratory judgment cases.

Court's decisions can be applied *purely* prospectively. In both those cases, the prevailing plaintiffs were awarded the remedy they had requested—declaratory relief in *Lemon II* and an award under 42 U.S.C. § 2000e-5(g) in *Norris*. In *Lemon II*, this Court ruled that plaintiffs' early abandonment of their preliminary injunction claim operated as a waiver estopping plaintiffs from reasserting that claim after they had obtained a favorable judgment in *Lemon I*. 411 U.S. at 196, 204-05. Accordingly, plaintiffs had no claim to enjoin the State from making payments for educational services rendered prior to entry of final judgment.

This Court's decision in *Norris* likewise was not purely prospective. The prevailing plaintiffs received an affirmative award on two out of three of the components of their prayer for relief (declaratory judgment and a permanent injunction). Judgment was awarded the plaintiffs under the statutory section on which they had based their claim, 42 U.S.C. § 2000e-5(g).[2] Analysis of the appropriate remedy in *Norris* focused on the district court's abuse of discretion in formulating retroactive relief. 463 U.S. at 1105-07. Title VII expressly delegates to the federal courts the authority to fashion "any . . . equitable relief the court deems appropriate." 42 U.S.C. § 2000e-5(g). Title VII's broad range of permissible relief is in marked contrast to the mandatory refunds Washington law prescribes as the *exclusive* remedy for the taxes this Court held unconstitutional in *Tyler*. *See* Wash. Rev. Code §§ 82.32.060; 82.32.180; J.S. App. 25a. *Norris*, then, does not involve the article III concerns

---

[2] 42 U.S.C. § 2000e-5(g) provides, in relevant part, as follows:

> If the court finds that the respondent has engaged in . . . an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, . . . or any other equitable relief as the court deems appropriate. . . .

presented here, but is limited to an evaluation of the competing equity interests in framing a remedy consistent with federal civil rights policy. *Norris*, 463 U.S. at 1105-07; *accord Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-18 (1975).

Nor was a federal rule of pure prospectivity formulated in *Great Northern Ry v. Sunburst Oil & Ref. Co.*, 287 358 (1932), as the State asserts. Unlike Article III courts, state courts may be permitted by state constitutions to issue advisory opinions on matters limited exclusively to state law issues. *Id.* at 364. In contrast, the court below was obliged by the Supremacy Clause to implement this Court's Commerce Clause decision in *Tyler*. *See* Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Lawyer 103, 117-29 (1988).

4. The State's Motion fails to address the threshold issue of whether Chevron can apply even if this Court had established a new principle of law in Tyler. A *Chevron* analysis is appropriate only in "second generation" litigation, not in the case that actually formulates the new principle of law. The State fails to acknowledge that *Chevron* considered only whether the new rule announced in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 852 (1969), should be applied retroactively to the similarly-situated *Chevron* litigants.[3] *Chevron*, properly applied, does not undermine the Article III principle. To condone the lower court's pretext would set a dangerous precedent permitting denial of refunds whenever a state's tax scheme abridges federal constitutional rights. This threat merits the Court's review.

5. The issue on appeal is the taxpayers' right to judicial relief on the tax refund claims presented in Tyler,

---

[3] *Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-09 (1971).

not the effect of post-Tyler legislation. The State's motion digresses to discuss new Washington legislation enacted after *Tyler* was decided. (Motion at 2-3.) Subsequent state legislation enacted in response to *Tyler* is not relevant to Article III principles assuring that this Court decide the controversy before it—in *Tyler*, the taxpayers' claim to recover the unconstitutional taxes collected by the State.[4]

---

[4] In its degression, the State argues that it has now enacted a "new system of credits" that operates to "eliminate any possibility of a multiple burden as a result of duplicate taxes imposed by another jurisdiction." (Motion at 3.) Even if that were relevant, this Court should harbor no such illusions.

In proposing the legislation, the Washington Department of Revenue assured its legislature that interstate manufacturers, whose burden under the scheme invalidated in *Tyler* was expected to be $882 million during the current biennium, would receive only a small fraction of that amount in "credits"—by the latest estimate, less than one tenth. Report of Legislative-Executive Committee on *National Can* Alternatives, S.B. 6078, July 28, 1987. The State rejected "fair apportionment" (via the 3-factor formula that the Court has recognized as the prevailing standard) as too costly. The State found unpalatable the economic cost to reduce the interstate taxpayers' burden to their "fair share", and the need of "shifting of taxes from out-of-state manufacturers" to in-state manufacturers. *Id.*

The new credits are a facade intended to avoid that cost. They do nothing to eliminate the *actual* multiple burden proved in this case by these taxpayers. J.S. of National Can Corp., *et al.*, App. I-3 ¶ 14 & I-4 ¶15, *decided sub. nom. Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 107 S. Ct. 2810 (1987). The credits are so narrowly drawn that they have, as Washington's legislature intended, minimal operative effect.

Although the new tax has already been challenged (Motion at 3, n.1), the State *once again* is positioning itself to profit from its discrimination. If the new formalisms are ultimately struck down, Washington will, based on the precedent of the decision below, apply any invalidating decision prospectively. The new form of discrimination will have been profitable and risk free in the interim.

6. Tyler, and the State's own admission, contradict the State's argument under Chevron's "reliance factor." Addressing *Chevron's* first prong—which it calls the "reliance factor"—the State labors to argue that *Tyler* "established a new principle of law by overruling past precedent on which the State had justifiably relied." (Motion at 8-16.) But the State has admitted that it did not rely —indeed, that it anticipated *Tyler*: "the *Armco* decision is clearly applicable to our statutory arrangement." J.S. App. 80a.

Tyler itself makes eminently clear that its holding was the product of evolution—an "extension of doctrines that had been growing and developing over the years." *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 499 (1968). *Tyler* repeatedly expressed a concern for earlier precedent: "*General Motors* is *not* a controlling *precedent* . . . , the result in that case did not depend on the Court's resolution of whether the tax burdened interstate commerce." (107 S.Ct. at 2817); "the State's justification for thus taxing the manufacture of goods in interstate commerce, however, *fails under our precedents*." (*id.* at 2818); "Washington's B&O tax scheme is therefore *inconsistent with our precedents*" (*id.* at 2820) (emphasis added).

In particular, *Tyler* left no doubt that it added no new "principle" to the rationale of *Armco*. On the contrary, *Tyler* pointedly relied on past precedent culminating in *Armco*.[5]

---

[5] "We conclude that our reasons for invalidating the West Virginia tax in *Armco* also apply to the Washington tax" (107 S. Ct. at 2813); "This statutory exemption . . . has the same facially discriminatory consequences as the West Virginia exemption we invalidated in *Armco*" (*id.* at 2816); "Our square reliance in *Armco* on Justice Goldberg's earlier dissenting opinion . . . dooms appellee's efforts" (*id.* at 2817); "*Armco* requires that we now agree . . . that the exemption before us is the practical equivalent of the ex-

7. The State's own argument demonstrates that the treatment of Chevron's "purpose" and "equity" tests by the Court below will guarantee to states the fruits of their discrimination. The State's Motion confirms that the decision below would reduce *Chevron's* "purpose" and "equity" requirements to a meaningless level—allowing states to profit from their discrimination against interstate commerce in virtually every case. The contradiction inherent in the State's argument is apparent from the rationale offered: "whatever chill was imposed on interstate trade was in the past." (Motion at 16, *quoting* J.S. App. 11a.) Discriminatory action—by necessity—is *always* in the past by the time this Court addresses a taxpayer's claim for refund. Does that mean that Commerce Clause policy is furthered by allowing the State to keep the discriminatory taxes? If this Court were to acquiesce, its message to Washington and other states would be that they run no risk in continuing to impose discriminatory taxes, because they can keep the fruits, just as if discrimination were not forbidden by the Constitution. To be sure, in the rare case fortunate enough to reach this Court, the State will be admonished, "you discriminated and you shouldn't." But, as surely as actions speak louder than words, the message that the states will receive and remember—and act upon—will be, "You can keep the fruits of your discrimination."

Thus, the decision below is sure to foster aggressive state behavior and discourage challenges to unconstitutional taxes—with a resulting chill on interstate trade for years to come.

Likewise, in every action for the refund of discriminatory taxes, the State will have spent the money at issue. If that is treated as a hardship that justifies non-

---

emption that the Washington Supreme Court invalidated in 1948," (*id.* at 2817); "We conclude, as we did in *Armco*, that manufacturing and wholesaling are not 'substantially equivalent events'" (*id.* at 2818).

retroactivity, states will always be permitted to retain the fruits of their discrimination.

CONCLUSION

For the reasons discussed, as well as the reasons stated by amici—American Sign & Indicator Corp., *et al.*; Institute of Property Taxation; Committee on State Taxation of the Council of State Chambers of Commerce; and Tax Executives Institute, Inc.—this Court should note probable jurisdiction.

Respectfully submitted,

D. MICHAEL YOUNG *
JOHN T. PIPER
CHRISTOPHER N. WEISS
BOGLE & GATES
The Bank of California
Center, Suite 2000
900 Fourth Avenue
Seattle, Washington 98164
(206) 682-5151
Counsel for Appellants
National Can Corp., et al.

* Counsel of Record